83-790

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

In The Matter of: Southern States Motor Inns, Inc., Debtor.

Southern States Motor Inns, Inc.,
Petitioner,

vs.

United States of America,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

Petition for Certiorari - Discovery

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QUESTION PRESENTED

Whether the Courts below erred in interpreting the phrase "value, as of the effective date of the Plan," as it is used in Section 1129(a)(9)(C) of the Bankruptcy Code (11 U.S.C.) in connection with deferred payments of priority taxes under a Plan of Reorganization.

DESIGNATION OF CORPORATION RELATIONSHIPS

Southern States Motor Inns, Inc., a Florida corporation, filing this Petition for Certiorari as Petitioner in this proceeding, states that:

This is its original designation of corporation relationships.

Southern States Motor Inns, Inc. is not owned by any parent corporation.

Southern States Motor Inns, Inc. does not have any ownereship interest in any subsidiaries.

Southern States Motor Inns, Inc. does not have any affiliates.

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IN THE SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Middle District of Florida, Orlando Division, was not reported but is attached as an Appendix hereto. The opinion of the of the United States Court of Appeals for the Eleventh Circuit is reported at 709 F.2d 647 (1983).

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the United States Court of Appeals for the Eleventh Circuit was made and entered on July 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

11 U.S.C. Sec. 1129(a) states in relevant part: The Court shall confirm a plan only if all of the following requirement are met:

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--;

(C) With respect to a claim of a kind specified in Section 507(a)(6) of this Title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

As of April 28, 1981, the date the Plan of Reorganization was confirmed, 26 U.S.C. Sec. 6621 provided as follows:

DETERMINATION OF RATE OF INTEREST

(a) In General. - The annual rate established under this section shall be

such adjusted rate as is established by the Secretary under Subsection (b).

(b) Adjustment of Interest Rate. - The Secretary shall establish an adjusted rate of interest for the purpose of subsection (a) not later than October 15 of any year if the adjusted prime rate charged by banks during September of that year, rounded to the nearest full percent, is at least a full percentage point more or less than the interest rate which is then in effect. Any such adjusted rate of interest shall be equal to the prime rate charged by banks, rounded to the nearest full percent, and shall become effective on February 1 of the immediately succeeding year. An adjustment provided for under this subsection may not be made prior to the expiration of 23 months following the date of any preceding adjustment under this subsection which changes the rate of interest.

(c) Definition of Prime Rate. - For purposes of subsection (b), the term "adjusted prime rate charged by banks" means 90 percent of the average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors or the Federal Reserve System.

Pub.L. No. 93-625, 88 Stat. 2108 (1975), as amended by Pub.L. No. 94-455, 90 Stat. 1520 (1976), and by Pub.L. No. 96-167, 93 Stat. 1275 (1979). Subsequently, Congress amended the statute on two occasions. First, Congress struck the last sentence of paragraph (b) which prevented more than one change within a 23-month period, substituted January 1 for February 1 in paragraph (b), and struck the words "90 percent of" preceding the words "the average predominant prime rate" in paragraph (c). See

Pub.L. No. 97-34,95 Stat. 340 (1981). Recently, Congress divided paragraph (b) into numbered subsections and, inter alia, substituted provisions for determining the rate of interest every six months. See Pub.L. No. 97-248, 96 Stat. 636 (1982).

STATEMENT OF THE CASE

The facts of this case as presented in the Opinion rendered by the United States Court of Appeals for the Eleventh Circuit are concise and will be largely quoted here. Debtor, Southern States Motor Inns, Inc., Petitioner herein, filed a Voluntary Petition for Reorganization under Chapter 11 of the Bankruptcy Code (11 U.S.C. Sec. 1101, et seq.) on October 23, 1979. The United States of America, Responden therein, filed a Priority Proof of Claim for unpaid federal tax liabilities totalling

$412,144.93. Subsequently, the Petitioner herein proposed a Plan of Reorganization under which Respondent's tax claims would be paid in five (5) annual installments. The Plan of Reorganization called for Petitioner to sell the motel property which was its principle asset, take back a purchase money mortgage from the buyer, and utilize the mortgage payments to fund the proposed payments to the Respondent. Respondent objected to the Plan because it did not provide for the payment of interest on the deferred tax payments. Petitioner then amended the Plan to provide for the payment of interest at a six percent (6%) rate, but Respondent maintained its objection to the Plan on the grounds that the six percent rate was inadequate. Consequently, the Bankruptcy Court conducted a hearing on April 14, 1981, to determine the rate which should

be applied in calculating interest on the deferred tax liabilities.

At that hearing, Petitioner presented evidence indicating that the interest rate on mortgages recently obtained in connection with the sale of its motel property ranged from 9.1% to 10%. Respondent then presented an expert witness who testified that at that time the minimum interest rate on safe investments, such as U.S. Treasury obligations, was 14%, and that interest rates on riskier investments, such as an unsecured loan to the debtor corporation, were even higher. Appellant agreed, however, to accept a 12% rate, which was the then current interest rate established by 26 U.S.C. Sec. 6621.

At the conclusion of the hearing, Judge Proctor, the Bankruptcy Judge, stated:

> I am going to hold in this case, as well as other cases that come before me, until some Appellate Court says that I shouldn't do it this way, I am going to commit myself to the statutory figure that the IRS establishes, less 1%. That 1% I am going to utilize is for purposes of the rehabilitation aspects that Congress apparently intended that the Court utilize in deciding whether to confirm a Plan, so in this case, since the IRS's statutory figure is 12%, then I'm going to take off 1% for the rehabilitation aspects and I'm going to commit to 11%.

Respondent sought review of the Bankruptcy Court's Order in the United States District Court for the Middle District of Florida. On February 24, 1982, in a Memorandum Opinion, the District Court affirmed the Bankruptcy Court's Order on the ground that the interest rate set by the Bankruptcy Court did not constitute reversible error. The District Court expressly refused to rule on the Bankruptcy Court's decision that in the future in Chapter 11 cases, it would apply the rate set by 26 U.S.C. Sec.

6621, less 1% for rehabilitative purposes.

Respondent again sought review of the District Court's Order in the United States Court of Appeals, Eleventh Circuit. The Court held that the Bankruptcy Court erred in looking exclusively to the interest rate established by 26 U.S.C. Sec. 6621 when establishing the interest rate to be paid in Chapter 11 cases and further overruled the Court's decision to deduct 1% from the interest rate to be applied to the deferred payments for "rehabilitation aspects" of the Plan of Reorganization. The Court concluded, gratuitously, that the evidence presented in the Bankruptcy Court established "that the prevailing market rate for comparable unsecured loans at the time the Plan became effective was greater than 14%". However, throughout the proceedings, the

Respondent had agreed to accept an interest rate of 12% and therefore the Court remanded the matter to the Bankruptcy Court for entry of an Order applying a 12% rate of interest in calculating the amount of deferred payments due Respondent. From that Order, the Petitioner brings this Petition.

EXISTENCE OF JURISDICTION BELOW

The United States Bankruptcy Court for the Middle District of Florida had jurisdiction over the Petition for Relief filed by Debtor below and Petitioner herein under the Bankruptcy Code, 11 U.S.C. Sec. 1101, et seq.

ARGUMENT

The only issue presented in this Petition is the determination of the proper standard for setting the rate of

interest applicable to payments of federal tax liabilities under a Chapter 11 Bankruptcy Reorganization. There appear to be no Circuit Court of Appeals decisions reported other than the decision by the lower court in this case. However, the Bankruptcy Courts have issued many conflicting decisions in this area, which applies to Chapter 13 proceedings as well as Chapter 11 cases. 11 U.S.C. Sec. 1325(a)(4).

Some courts have adopted one rate of interest applicable to all types of claims. See e.g., In Re: Crocket, 3 B.R. 365 (Bkrtcy N.D. Ill. 1980) in which the Court adopted the interest rate applicable to Judgments, and In Re: Ziegler, 6 B.R. 3 (Bkrtcy S.D. Ohio 1980) in which the Court adopted the interest rate established by the Internal Revenue Code (26 U.S.C. Sec. 6621). The Court in

In Re: Tacoma Recycling, 23 B.R. 547, (Bkrtcy W.D. Wash. 1982) used an interest rate established by 28 U.S.C. 1961(a) (Section 302[a] of the Federal Court Improvements Act of 1982) for interest on Judgments in Federal Court. Other Courts have devised certain formulas in an attempt to arrive at a proper method for determining the appropriate interest rate. See e.g. In Re: Bay Area Services, 26 B.R. 811 (Bkrtcy M.D. Fla. 1982) in which the Court utilized a current prevailing prime rate plus 10% adjustment for inflation; In Re: Lum, 1 B.R. 186 (Bkrtcy N.D. Tenn. 1979) in which the Court used the legal rate with an upward adjustment; In Re: Willis, 6 B.R. 555 (Bkrtcy N.D. Ill. 1980) in which the Court used the three-month Treasury Bill rate with an upward adjustment of one-half percent; In Re: Kibler,

8 B.R. 957 (Bkrtcy Hawaii 1981) in which the Court used a rate midway between the rate in the Contract and the interest rate charged by Credit Unions; and In Re: Weaver, 5 B.R. 522 (Bkrtcy N.D. Ga. 1980) in which the Court used a flat 10% rate with no explanations.

The Bankruptcy Court for the Southern District of California in In Re: Miller, 4 B.R. 392 (Bkrtcy S.D. Calif. 1980) appears to have utilized a method very similar to the method employed by the Bankruptcy Court in the case sub judice. That Court determined a rate at which the Debtor could borrow funds and then applied a "downward adjustment". In the case sub judice, the Bankruptcy Court deducted one percent (1%) from the interest rate specified in 26 U.S.C. Sec. 6621 for "rehabilitation aspects" on the

theory that Congress intended rehabilitation to be a significant aspect in any Chapter 11 proceeding.

Several Appellate Courts have requested appellate review in an attempt to resolve the wide disparity of interest rates being applied to debtors in different Districts. See e.g. In Re: Hyden, 10 B.R. 21, 26 (Bkrtcy S.D. Ohio 1980).

In the case sub judice, the Lower Court fell short of the mark in its attempt to weigh the evidence presented to the Bankruptcy Court, which in any event was outside the purview of its appellate jurisdiction. The evidence showed that the Respondent would be paid from the proceeds of a mortgage obtained by the Petitioner from the sale of its principle asset. The Respondent attempted to show that it was being forced to make an unsecured loan to the Petitioner when in fact

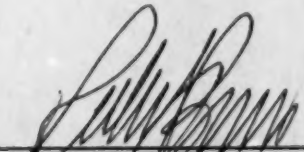
payment of that "loan" was to be from sources totally secured by a purchase money mortgage on property sold by the debtor. This type of confusion will continue to exist as long as the Bankruptcy Courts are given no guidance by this Court in the application of 11 U.S.C. Sec. 1129(a)(9)(c).

The question presented by this case is of great and recurring significance in the administration of Chapters 11 and 13 of the Bankruptcy Code. There is obviously a wide disparity in the treatment of Chapter 11 and Chapter 13 debtors among the different Bankruptcy Court jurisdictions in this country. It would appear to be patently unfair, not only to the debtors, but to the unsecured creditors who must stand in line behind the priority tax claims of the Internal Revenue Service, to allow this disparity to

continue. While no one questions that the IRS is entitled to interest on any deferred payments it receives under a Chapter 11 or Chapter 13 Bankruptcy Plan, there must be some guidance and uniformity in the administration and application of the provision entitling it to that interest.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.



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APPENDIX

Judgment of the United States
Court of Appeals for the Eleventh Circuit

Memorandum Decision of United
States District Court for
the Middle District of Florida

MATTER OF SOUTHERN STATES MOTOR INNS, INC.

In the Matter of SOUTHERN STATES MOTOR INNS, INC., Debtor.
UNITED STATES of America.
Appellant.
v.
SOUTHERN STATES MOTOR INNS, INC., Appellee.
No. 82-5518.
United States Court of Appeals, Eleventh Circuit.
July 11, 1983

Corporate debtor filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. The United States filed a priority proof of claim for unpaid federal tax liabilities. The debtor proposed a reorganization plan under which the government's tax claims would be paid in five annual installments, but the government objected to the plan's provision for payment of interest at a rate of six percent. The bankruptcy court ruled that an interest rate of 11 percent was appropriate, and the United States District Court for the Middle District of Florida, George C. Young, J., affirmed. Upon

the government's appeal, the Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that in determining interest rate to be applied in calculating deferred payments of delinquent federal taxes pursuant to section of Bankruptcy Code providing that court shall confirm plan of reorganization only if holder of priority tax claim will receive "deferred cash payments * * * of a value, as of the effective date of the plan, equal to the allowed amount of such claim," bankruptcy court applied the then-current rate of interest established by formula set forth within Section 6621, 26 U.S.C.A., on unpaid federal tax liabilities generally, less a one percent reduction for "rehabilitation aspects" of the reorganization plan; however, this method was erroneous in that the interest rate currently charged under Section 6621, while relevant to determining prevailing market rate, should not be looked to

exclusively, and there should also be no deduction for "rehabilitation aspects."

Reversed and remanded with instructions.

1. Interest

In determining interest rate to be applied in calculating deferred payments of delinquent federal taxes pursuant to section of Bankruptcy Code providing that court shall confirm plan of reorganization only if holder of priority tax claim will receive "deferred cash payments * * * of a value, as of the effective date of the plan, equal to the allowed amount of such claim," bankruptcy court applied the thencurrent rate of interest established by formula set forth within Section 6621, 26 U.S.C.A., on unpaid federal tax liabilities generally, less a one percent reduction for "rehabilitation aspects" of the plan; however, this method was erroneous in that the interest rate currently charged under Section 6621,

while relevant to determining prevailing market rate, should not be looked to exclusively, and there should also be no deduction for "rehabilitation aspects." Bankr.Code, 11 U.S.C.A. § 1129(a)(9)(C); 26 U.S.C.A. § 6621.

2. Bankruptcy

In regard to provision of Bankruptcy Code stating that a bankruptcy court shall confirm a plan of reorganization only if the holder of a priority tax claim will receive "on account of such claim deferred cash payments * * * of a value, as of the effective date of the plan, equal to the allowed amount of such claim," the legislative history of the code indicates that Congress used the phrase "value, as of the effective date of the plan" in order to insure that creditors with priority tax claims who were required to accept payments over time would receive deferred payments equivalent to the present value of their claims. Bankr.Code, 11 U.S.C.A. §

1129(a)(9).

3. Bankruptcy

Proper method of providing priority tax creditors with the equivalent of the value of their claims as of the effective date of a reorganization plan is to charge interest on the claim throughout the payment period. Bankr.Code, 11 U.S.C.A. § 1129(a)(9).

4. Interest

In determining appropriate interest rate for deferred payments of delinquent federal taxes pursuant to provision of the Bankruptcy Code, the rate of interest must be determined on the basis of the rate which is reasonable in light of the risks involved; thus, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default.

5. Interest

Interest rate to be used in comput-

ing present value of a claim pursuant to section of the Bankruptcy Code providing, in essence, that a bankruptcy court shall confirm a plan of reorganization only if the holder of a priority tax claim will receive "on account of such claim" should be the current market value without any reduction for "rehabilitation aspects" of the plan. Bankr.Code, 11 U.S.C.A. § 1129(a)(9).

6. Federal Courts

Usual procedure when findings are infirm because of an erroneous view of the law is to remand for further proceedings, but such proceedings are not required when the record permits only one resolution of the factual issue.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and ANDERSON, Circuit Judges, and COLEMAN*, Senior Circuit Judge.

R. LANIER ANDERSON, III, Circuit

Judge:

[1] The sole issue on this appeal concerns the proper method for determining the rate of interest to be applied in calculating deferred payments of delinquent federal taxes pursuant to § 1129(a)(9)(C) of the Bankruptcy Code, 11 U.S.C. § 1129 (a)(9)(C). The Bankruptcy Court applied the then-current rate of interest established by the formula set forth in 26 U.S.C. § 6621 for interest on unpaid federal tax liabilities generally,[1] less a 1% reduction for the "rehabilitation aspects" of the plan of

* Honorable James P. Coleman, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

1. As of April 28, 1981, the date the plan of reorganization was confirmed, 26 U.S.C. § 6621 as follows:

DETERMINATION OF RATE OF INTEREST
(a) In General.-The annual rate established under this section shall be such adjusted rate as is established by the Secretary under Subsection (b).
(b) Adjustment of Interest Rate.-The Secretary shall establish an adjusted rate of interest for the purpose of subsection (a) not later than October 15 of any year if the adjusted prime rate charged by banks during September of that year, rounded to the nearest full percent, is at least a full percentage point

reorganization. The district court affirmed on the ground that the Bankruptcy Court's findings did not constitute reversible error. For the reasons discussed below, we reverse.

more or less than the interest rate which is then in effect. Any such adjusted rate of interest shall be equal to the prime rate charged by banks, rounded to the nearest full percent, and shall become effective on February 1 of the immediately succeeding year. An adjustment provided for under this subsection may not be made prior to the expiration of 23 months following the date of any preceding adjustment under this subsection which changes the rate of interest.

(c) Definition of Prime Rate.-For purposes of subsection (b), the term "adjusted prime rate charged by banks" means 90 percent of the average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System.

Pub.L. No. 93-625, 88 Stat. 2108 (1975), as amended by Pub.L. No. 94-455, 90 Stat. 1520 (1976), and by Pub.L. No. 96-167, 93 Stat. 1275 (1979). Subsequently, Congress amended the statute on two occasions. First, Congress struck the last sentence of paragraph (b) which prevented more than one change within a 23-month period, substituted January 1 for February 1 in paragraph (b), and struck the words "90 percent of" preceding the words "the average predominant prime rate" in paragraph (c). See Pub.L. No. 97-34, 95 Stat. 340 (1981). Recently, Congress divided paragraph (b) into numbered subsections and, inter alia, substituted provisions for determining the rate of interest every six months. See Pub.L. No. 97-248, 96 Stat. 636 (1982).

The facts of this case are undisputed. The debtor, Southern States Motor Inns, Inc., filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code on October 23, 1979. Appellant, the United States, filed a priority[2] proof of claim for unpaid federal tax liabilities totaling $412,144.93. Subsequently, the debtor proposed a reorganization plan under which appellant's tax claims would be paid in five annual installments. Appellant objected to the plan because it did not provide for the payment of interest on the deferred tax payments. The debtor then amended the plan to provide for the payment of interest at a 6% rate, but appellant maintained its objection to the plan on the ground that the 6% rate was inadequate. Consequently, the Bankruptcy Court conducted a hearing on April 14, 1981, to deter-

2. The government's unsecured tax claim was entitled to priority under 11 U.S.C. § 507(a)(6).

mine the rate which should be applied in calculating interest on the deferred tax liabilities.

At the hearing, the debtor presented evidence indicating that the interest rate on mortgages recently obtained in connection with the sale of its motel property ranged from 9.1% to 10%. Appellant responded by presenting an expert witness who testified that at that time the minimum interest rate on safe investments, such as U.S. Treasury obligations, was 14%, and that interest rates on riskier investments, such as an unsecured loan to the debtor, were even higher. Appellant agreed, however, to accept a 12% rate, which was the then-current interest rate established by 26 U.S.C. § 6621.[3]

At the conclusion of the hearing, the Bankruptcy Court stated:

> I'm going to hold in this case, as well as other cases that come

3. See note 1 supra.

before me, until some Appellate Court says that I shouldn't do it this way, I'm going to commit myself to the statutory figure that the I.R.S. establishes, less 1%. That 1% I'm going to utilize is for purposes of the rehabilitation aspects that Congress apparently intended that the Court utilize in deciding whether to confirm a plan, so in this case, since the I.R.S.'s statutory figure is 12%, then I'm going to take off 1% for the rehabilitation aspects, and I'm going to commit to 11%.

Record on Appeal at 57-58.

Appellant sought review of the Bankruptcy Court's order in the district court. On February 24, 1982, the district court affirmed the order on the ground that the interest rate set by the district court did not constitute

reversible error.[4] This appeal followed.

[2,3] Section 1129(a)(9)(C) of the Bankruptcy Code provides, in essence, that a Bankruptcy Court shall confirm a plan of reorganization only if the holder of a priority tax claim will receive "on account of such claim deferred cash payments... of a value, as of the effective date of the plan, equal to the allowed amount of such claim." Id.[5] The legislative history of the

4. The district court expressly limited its affirmance to the facts of this case and did not rule "one way or the other on the gratuitous comments of the Bankruptcy Judge that henceforth he will in Chapter XI cases set interest at 1% off the rate then currently set by the [IRS] for interest owed the Service..." Record on Appeal at 140 n. 1.

5. 11 U.S.C. § 1129(a) states in relevant part:

> The court shall confirm a plan only if all of the following requirements are met:
>
> (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--
>
> (C) With respect to a claim of a kind specified in section 507(a)(6) of this Title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan,

Codes indicates that Congress used the phrase "value, as of the effective date of the plan" in order to insure that creditors with priority tax claims who were required to accept paymnets over time would receive deferred payments equivalent to the present value of their claims. See, e.g., 124 Cong.Rec. 32,406, 34,006 (1978) (joint explanatory statement of floor managers, Sen. DeConcini & Rep. Edwards, indicating that governmental unit tax claims entitled to priority under § 507(a)(6) "may be required to take deferred cash payments over a period not to exceed 6 years after the date of assessment of the tax with the present value equal to the amount of the claim") (emphasis added); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 408 (1977), U.S.Code Cong. and Admin.News 1978 pp. 5787,6364 (stating that " '[v]alue, as of the effective date of the plan,' as used

equal to the allowed amount of such claim.

in... proposed 11 U.S.C.... 1129(a)(9) [and several other sections], indicates that the promised payment under the plan must be discounted to present value as of the effective date of the plan"); cf. id. at 412, U.S.Code Cong. & Admin.News 1978, p. 6368 ("[T]he court may confirm a plan over the objection of a class of secured claims if the members of that class are unimpaired or if they are to receive under the plan property of a value equal to the allowed amount of their secured claims... The property is to be valued as of the effective date of the plan, thus recognizing the time-value of money."). The Bankruptcy Courts have almost uniformly ruled that the proper method of providing such creditors with the equivalent of the value of their claim as of the effective date of the plan is to charge interest on the claim throughout the payment period. See e.g., In re Bay Area Services, 10 Bankr.Ct.Dec. (CRR) 101, 26

B.R. 811 (Bkrtcy.M.D.Fla.1982); In re Moore, 9 Bankr.Ct.Dec. (CRR) 1246, 25 B.R. 131 (Bkrtcy.N.D.Tex.1982); cf. In re Busman, 5 B.R. 332, 341 (E.D.N.Y. 1980) (holding that identical language in 11 U.S.C. § 1325(a) (5)(B)(ii) requires that when secured tax claim is to be paid in stallments pursuant to a Chapter 13 plan, the creditor "is entitled to a percentile interest factor, to protect the creditor from loss caused by its being paid over time"). But see In re Burgess Wholesale Manufacturing Opticians, 16 B.R. 733 (Bkrtcy.N.D.Ill.) (holding that there is no right to post petition interest on unsecured tax claims in Chapter 11 proceeding when other unsecured creditors are not paid in full), aff'd, 24 B.R. 554 (N.D.Ill.1982).

Although Bankruptcy Courts generally agree that creditors should receive interest on deferred tax payments pursuant to § 1129(a)(9) (C), they have

not agreed on the proper method for determining the appropriate interest rate. See, e.g., In re Bay Area Services, supra (current prevailing prime rate plus 10% adjustment for inflation); In re Hathaway Coffee House, 9 Bankr. Ct.Dec. (CRR) 1093, 24 B.R. 534 (S.D. Ohio 1982) (in the absence of any contrary argument by debtor, government entitled to rate set in 26 U.S.C. § 6621); In re Moore, supra (rejecting IRS argument that rate established by 26 U.S.C. § 6621 should be applied because uncontradicted evidence presented by debtor demonstrated that lower rate would fully compensate the government); In re Tacoma Recycling, 23 B.R. 547 (Bkrtcy.W.D.Wash.1982) (rate established by 28 U.S.C. § 1961 (a) (§302 (a) of the Federal Court Improvement Act of 1982) for interest on judgments in federal court). Compare, e.g., the following cases in which courts used various methods of determining the proper

interest rate necessary to give a creditor the value of its claim as of the effective date of the plan in Chapter 13 proceedings: In re Benford, 14 B.R. 157 (Bkrtcy.W.D.Ky.1981) (prevailing market rate for consumer loan contracts); In re Klein, 10 B.R. 657 (Bkrtcy.E.D.N.Y.1981) (average of legal rate of interest in State of New York and contract rate); In re Marx, 11 B.R. 819 (Bkrtcy. S.D.Ohio 1981) (rate applicable to judgements); In re Crotty, 11 B.R. 507 (Bkrtcy. N.D.Tex.1981) (rate established by 26 U.S.C. § 6621); GMAC v. Willis (In re Willis), 6 B.R. 555, 557 (Bkrtcy.N.D.Ill.1980) ("annual percentage rate not to exceed 1/2 of 1% more than the auction average of 3-month United States Treasury Bills" for the week the petition for relief was filed); GMAC v. Hyden (In re Hyden), 10 B.R. 21 (Bkrtcy.S.D.Ohio 1980) (average of the interest rate in effect in Ohio for Installment Sales Contracts, the interest

rate stated in the contract, and an arbitrary "leveling factor" of 6%); In re Zeigler, 6 B.R. 3 (Bkrtcy.S.D.Ohio 1980) (rate established by 26 U.S.C. § 6621 even though the creditor was not a governmental entity); GMAC v. Lum (In re Lum), 1 B.R. 186 (Bkrtcy.E.D.Tenn.1979) (adopting 10% rate after considering the contract rate of interest, the relevant state statute regulating interest, and "economic concerns").

In determining the interest rate in this case, the Bankruptcy Court adopted the rate established by 26 U.S.C. § 6621 less a 1% reduction for "rehabilitation aspects." We believe that this was an inadequate method for determining a rate which would give appellant deferred payments equal to the present value of its claim as required by § 1129 (a)(9)(C).

[4] The factors relevant to determining an appropriate interest rate are succinctly summarized in 5 Collier

on Bankruptcy ¶ 1129.03, at 1129-65 (15th ed. 1982):

> The appropriate discount [interest] rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount [interest] rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default.

The interest rate computed under the formula set out in 26 U.S.C. § 6621 does not meet this criteria for two reasons. First, the § 6621 rate does not necessarily correspond with the "prevailing market rate." At the time of the confirmation hearing, when the bankruptcy judge ruled that he would henceforth use the § 6621 rate less 1%, the § 6621 interest rate could lag

almost two years behind actual market rates. See note 1 supra. Even with the recent amendments to § 6621, see id., the § 6621 rate in effect on the date of a confirmation hearing will have been established from three and one-half to nine and one-half months previously. In view of recent fluctuations in interest rates, it is obvious that the § 6621 rate often will differ significantly from actual market rates. See, e.g., In re Moore, 9 Bankr.Ct.Dec. (CRR) at 1248, 25 B.R. 131 ("application of § 6621 could result in a windfall to IRS" because § 6621 rate was 20% while debtors uncontradicted evidence established that market rates as of date of hearing were 12%); In re Tacoma Recycling, 23 B.R. at 556 (rejecting § 6621 rate as not "indicative of current economic conditions"); In re Bay Area Services, 10 Bankr.Ct.Dec. (CRR) at 103, 26 B.R. 811 (labeling § 6621 rate "static and arbitrary when applied to

the deferred payment of an unsecured priority tax claim where the primary intent is [to] provide the Government with a future amount equal in value to an amount paid in full upon the effective date of [the plan]. Second, applying the § 6621 rate to all deferred payments under § 1129(a)(9)(C) ignores variations between the length of the payout period, the quality of the security, and the risk of subsequent default.[6] Thus, although the rate

6. The variations between length of payout period, quality of security, and risk of default under § 1129 (a)(9)(C) may be relatively small because that section only deals with unsecured loans which must be paid within a six-year period. Nevertheless, the potential variations are not so insignificant that a single interest rate would be appropriate for all situations. Moreover, the phrase "value, as of the effective date of the plan" appears in several other subsections of § 1129 as well as in Chapter 13, see 11 U.S.C. §§ 1129 (a)(7)(B), (a)(9)(B)(i), (b)(2)(A)(i)(II), (b)(2) (B)(i), (b)(2)(C)(i), 1325(a)(4), (a)(5)(B)(ii) and applies to a wide variety of claims. Neither the statute nor the legislative history suggests that "value" as used in §1129 (a)(9)(C) should be determined simply by reference to § 6621 while "value" as used in the other sections should be determined by an analysis of market rates, and we seriously doubt that Congress intended that the § 6621 rate should be used to determine value in all

currently charged under § 6621 may be relevant to determining the prevailing market rate,[7] we believe the Bankruptcy Court erred by looking exclusively to the § 6621 rate when establishing the interest rate in this case.

[5] In addition, we believe the district court erred when it deducted 1% from the interest rate to be applied to the deferred payments for the "rehabilitation aspects" of the reorganization plan. As noted in In re Benford, supra,

these sections.

7. As one commentator has suggested, deferred payment of a claim under § 1129 is a "coerced loan and the rate of return with respect to such loan must correspond to the rate which would be charged or obtained by the creditor making a loan to a third party with similar terms, duration, collateral, and risk. 15 Collier on Bankruptcy § 1129.03, at 1129-62 & 63. A taxpayer can obtain an involuntary "loan" from the government by failing to pay his taxes, and the government then is entitled to interest on the delinquent liabilities at the rate set by § 6621. Thus, the § 6621 rate may be relevant because it is the rate at which the government would make a "loan" to a third party. We do not believe, however, that the § 6621 rate should be the exclusive measure of the rate which will give the government the value of its claim as of the effective date of the plan.

a Chapter 13 case construing language identical to that found in § 1129 (a)(9)(C) "[t]he statute reads 'value, as of the effective date of the plan'; it does not read 'value, as of the effective date of the plan, but subject to reduction depending on the debtor's ability to pay'." 14 B.R. at 161. We believe Congress intended that creditors required to accept deferred payments pursuant to a § 1129(a)(9)(C) should be placed in as good a position as they would have been had the present value of their claims been paid immediately.[8]

8. It is noteworthy that under prior law federal tax claims of the type involved here, as well as the claims of certain private creditors, had to be paid in full before a plan of reorganization could be confirmed. See. e.g., Bankruptcy Act of 1898, ch. 541, §§ 64, 199, 30 Stat. 544 (11 U.S.C. 1976 ed. §§ 104, 599)(repealed 1978). The Senate version of the Bankruptcy Reform Act of 1978 originally provided that such claims had to be paid in cash within 60 days of the confirmation of the plan, S.Rep. No. 95-989, 95th Cong., 2d Sess., 128 (1978), U.S.Code Cong. & Admin. News 1978, p. 5787, and subsequently was amended to provide for cash payment within 120 days. Id. The final version enacted by Congress permitted deferred cash payments, but indicated that the creditor should receive the value of the claim as of the effective date of the

Consequently, we hold that the interest rate to be used in computing present value of a claim pursuant to § 1129(a)(9)(C) should be the current market rate without any reduction for the "Rehabilitation aspects" of the plan.[9]

[6] In this case, the evidence presented by appellants established that the prevailing market rate for comparable unsecured loans at the time the plan became effective was greater than 14%.[10] At the confirmation hearing, in its brief appeal and at oral agreement, however, appellant agreed to accept a 12% rate. Accordingly, because the

plan. Nothing in the legislative history indicates that Congress intended reductions in the amount to be received by the creditor on account of the rehabilitation aspects of the plan.

9. Our holding does not indicate that the debtor's ability to pay is not a factor the court should consider when deciding whether to confirm a plan of reorganization. Obviously, a plan should not be confirmed unless it is feasible. The debtor's ability to pay, however, is irrelevant when the question is whether the plan provides for payment of the present value of a creditor's claim as required by § 1129(a)(9)(C).

record would not permit a finding that the appropriate interest rate was less than the 12% rate which is acceptable to appellant,[11] we reverse the judgments rendered below and remand with instruction to apply a 12% rate of interest in calculating the amount of the deferred payments due to the United States under the provisions of § 1129(a)(9)(C).[12]

REVERSED AND REMANDED WITH INSTRUCTIONS.

10. As noted above, the debtor also presented evidence regarding current interest rates at the confirmation hearing. The debtor's evidence, however, related to secured loans rather than unsecured loans, and the record also suggests that the interest rates on those secured loans may not have been the product of arm's-length negotiations. Consequently, we do not believe the debtor's evidence accurately reflected prevailing market rates for unsecured loans.

11. The usual procedure when findings are infirm because of an erroneous view of the law is to remand for further proceedings, but such proceedings are not required when the record permits only one resolution of the factual issue. Pullman-Standard v. Swint, 456 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66, 82 (1982).

12. At oral argument, the debtor for the first time suggested that appellant's appeal was moot because there are insufficient funds

to pay interest at a 12% rate rather than at the 11% rate set by the courts below. In rebuttal, appellant contended that suffient funds are available to pay the higher interest rate or, in the alternative, that if sufficient funds are not available, the debtor's assets could be liquidated pursuant to 11 U.S.C. § 1112(b). We cannot resolve this factual dispute on the current record. If the Bankruptcy Court finds on remand that there are insufficient funds to pay interest at the 12% rate, then the court will have to determine the proper alternative resolution in a manner not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN THE MATTER OF:
Case No. 81-295-Orl-Civ-Y

SOUTHERN STATES MOTOR INNS, INC.,

Debtor;

UNITED STATES OF AMERICA,

Appellant.
vs.

SOUTHERN STATES MOTOR INNS, INC.,

Appellee.

_____/

MEMORANDUM OPINION

This cause is before the Court on the appeal of the United States of America from an order of the Bankruptcy Court entered on April 28, 1981, which confirmed the debtor's Second Amended Plan of Reorganization in the Chapter XI bankruptcy proceeding below. The issues presently before the Court, as set forth in appellant's designation of record and statement of issues on appeal, are as follows:

1) Whether the Bankruptcy Court erred in the confirmation of the debtor's Second Amended Plan of Reorganization over the objection and rejection by the United States; and

2) Whether the Plan confirmed by the Bankruptcy Court failed to provide deferred cash payments to the United States, over a period not extending six years after assessment, of a value as of the effective date of the Plan, equal to the full amount of the priority claim by the United States for taxes, within the meaning of 11 U.S.C. §1129(a)(9)(C).

The facts relevant to the issues presented on appeal are not disputed. The debtor herein operated a motel business in the Orlando, Florida, area and commenced this bankruptcy proceeding by filing its voluntary petition for reorganization under Chapter XI of the Bankruptcy Code on October 23, 1979. Appellant United States thereafter filed

its priority proof of claim for unpaid federal tax liabilities in the total amount of $412,144.93. The majority of unpaid taxes were assessed on December 6, 1979. Other smaller assessments were made on July 9, 1979 and March 18, 1980.

On August 5, 1980 the debtor filed its Second Amended Disclosure Statement and its Second Amended Plan of Reorganization. The plan of reorganization set forth therein was described by the debtor as "basically a plan for liquidation of the assets and distribution of the proceeds to the creditors and the company." The debtor subsequently sold its motel assets, and it is from the proceeds of that sale that payments are to be made under the Plan.

Under the debtor's Second Amended Plan of Reorganization the priority tax claims of the United States were to be paid in five (5) equal installments,

beginning one year after confirmation. No provision for the payment of interest was included in the Plan as originally filed. Following the filing of the United States' objections and rejection of the Plan the debtor proposed to pay six percent (6%) interest on the United States' claim.

The United States maintained its objection to the Plan, however, it indicated its willingness, as a matter of administrative convenience, to agree to an otherwise acceptable plan if interest were paid on its claim pursuant to 26 U.S.C. §6621, and the regulations thereunder, at the then current rate of twelve percent (12%). Although the United States was willing to agree to an interest rate set at twelve percent (12%), it nevertheless made plain its position that, under the Bankruptcy Code, it was in fact entitled to be paid at a substantially "higher present going

rate of interest." The Bankruptcy Court thereupon set the matter down for hearing on April 14, 1981 on "the amount of the interest payment, and anything else that may be pertinent to this particular situation."

At the hearing the debtor presented the testimony of Neil Babbs, President of Southern States Motor Inns, the debtor herein. Babbs testified concerning the financing obtained in connection with the sale of the subject motel property. He related that the interest rates negotiated during the arms length transactions for the sale of the motel ranged from nine and one-quarter percent (9 ¼%) on the first mortgage held by Columbia Banking to ten percent (10%) on the purchase money mortgage taken by Southern States Motor Inn. The holder of a second mortgage in the amount of fifty thousand dollars ($50,000) also agreed to a rate of ten percent (10%),

with the balance to be paid off over a period of five years.

The United States then called its expert, who testified that the minimum applicable then present rate of interest on absolutely safe investments in Treasury obligations was no less than fourteen percent (14%). He further testified that riskier investments bore higher interest rates ranging from fifteen percent (15%) to more than twenty percent (20%), and that the risk incident to the debtor was higher than any of those cited.

Following the presentation of evidence, the Bankruptcy Judge ruled as follows:

> "Very well, the Court is prepared to rule. What I need to do is to decide what the present value is in the light of rehabilitation.
> I think you have three groups that are being heard at this hearing. The Debtor would like to have its plan

confirmed. That's why it came before the Court in the first instance - interested in getting its debts off its back, trying to get its debts off its back at the lightest possible cost. On the other side of the coin, Internal Revenue is looking out for itself, just like anybody else, and they'll take the highest rate that this Court or any Court will give to them. Then, thirdly, you have Mr. Rotella speaking for the unsecured creditors, and the unsecured creditors will take the highest rate that they can get, so I don't really see any type of equity that I have to deal with in this type of a situation because everybody is looking out for themselves, and that's what life is all about, anyway.

I'm going to hold, because I have to do this, and I might as well set an arbitrary figure for my own purposes, because I'm going to be running into this in cases in Chapter 11, in the same way that I have committed myself to 10% in Chapter 13.

I'm going to hold in this case, as well as other cases that come before me, until some Appellate Court says that I shouldn't do it this way, I'm going to commit myself to the statutory [figure] that the I.R.S. establishes, less 1%. That 1% I'm going to utilize is for purposes of the rehabilitation aspects that Congress apparently intended that the Court utilize in

> deciding whether to confirm a plan, so in this case, since the I.R.S.'s statutory figure is 12%, then I'm going to take off 1% for the rehabilitation aspects, and I'm going to commit to 11%. Now in the future, that is the way I'm going to do, if anyone is interested, in the future, you will know that is the figure I'm going to use until some Appellate Court tells me that there is a different way to do it."

On April 28, 1981 the Bankruptcy Court entered its final order approving the debtor's Second Amended Plan, as modified, and providing for the eleven percent (11%) rate of interest to be paid to the United States on its claim. The United States appeals from this order.

The parties concede that the issues presented herein relate to the proper interpretation of 11 U.S.C. §1129 (a) (9) (C), which provides:

> "(a) The Court shall confirm a plan only if all of the following requirements are

met:

. . .

> (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that -
>
> . . .
>
> (C) with respect to a claim of a kind specified in section 507(a) (6) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim."

Appellant contends that the Bankruptcy Court's application of §1129 (a) (9) (C) erred in two separate respects. Initially, appellant argues that the debtor's Plan violates the above statutory provision in that it fails to provide for the payment of deferred cash payments within the time limitations prescribed by the statute. In addition, appellant argues that the restriction of

interest to be paid on its priority tax claim to eleven percent (11%) constitutes reversible error.

In support of its first issue raised in the present appeal, appellant states that the fifth and final payment to be made to the Unites States under the Plan approved below is not due until April 28, 1986. Since the bulk of the federal taxes underlying appellant's claim were assessed against the debtor on or before December6, 1979, the government argues that the Plan exceeds the six (6) year time limitation for deferred cash payments set forth in §1129 (a) (9) (C).

A review of the record below, including appellant's objections to the Second Amended Plan and the transcript of the final hearing before the Bankruptcy Court, reveals that appellant failed to present this issue to the

Court below. Appellant filed a brief in opposition to the Second Amended Plan on September 10, 1980, which contained numerous objections to the debtor's Plan. Noticeably absent in appellant's brief is its present contention that the Plan exceeded the time limitations prescribed by §1129 (a) (9) (C) for the payment of deferred cash benefits. At the hearing held on April 14, 1981, the Bankruptcy Judge advised all parties that the hearing had been called to consider "the amount of interest payment, and anything else that may be pertinent to this particular situation." Notwithstanding the Court's willingness to dispose of all remaining objections to the Plan, appellant failed to present this issue at that time. Bankruptcy Rule 924 further proviced appellant an opportunity to present this issue to the Court below in a motion for reconsideration of the April 28, 1980 order; however, appellant failed to avail

itself of this remedy.

Courts have frequently refused to consider on appeal issues not previously submitted to the Bankruptcy Court. E. F. Corp. v. Smith, 496 F.2d 826, 829 (10th Cir. 1974); Garfinkle v. Levin, 460 F.Supp. 670, 672 (S.D. N.Y. 1978); In re Gardner, 455 F.Supp. 327, 329 (N.D. Ala. 1978); In re Williamson, 431 F.Supp. 1023, 1027 (W.D. Okla. 1976); In re Unikraft Homes of Virginia, Inc., 370 F.Supp. 667, 673 (W.D. Va. 1974). As noted in Matter of Fowler, 407 F.Supp. 799, 805 (W.D. Okla. 1975), other courts have held that it is discretionary with the district court whether to consider issues raised for the first time on appeal. Diamond National Corp. v. Lee, 333 F.2d 517, 538 (9th Cir. 1964); In re Cedor, 337 F.Supp. 1103 (N.D. Calif. 1972). Another view is that the reviewing court is not barred from considering any issue fairly presented by the

record, even though it was not expressly discussed by or before the Bankruptcy Court. In re Gilchrist, 410 F.Supp. 1070, 1074 (E.D. Pa. 1976); In re Dunn, 251 F.Supp. 637 (M.D. Ga. 1966); 1 Collier on Bankrptcy, ¶3.03[8][a[at 3-313 (15th ed. 1980). However, even under the latter view the commentators concede that "questions foreign to the record and presented neither by the testimony nor the pleadings, would [not] be considered [on appeal]; nor could objections to evidence received by the referree be raised for the first time on review of an order made by him." 1 Collier, id., ¶3.03[8][a] at 3-314.

Appellant had sufficient opportunity to present the first issue raised in this appeal to the Court below, but failed to do so. An appeal to the District Court is not a trial de novo. See Rule 810, Rules of Bankruptcy Procedure; In re Gardner, supra, at 329.

This Court's review of a ruling of the Bankruptcy Court is limited to those issues properly presented to the Bankruptcy Court. In the absence of any evidence that the issue was in fact properly presented to the Bankruptcy Court, this Court will give no further consideration to appellant's contention that the debtor's Plan exceeds the time limitation set forth in §1129 (a) (9) (C).

Appellant's remaining claim of error is that the Bankruptcy Court's restriction of the interest to be paid on appellant's tax claim to eleven percent (11%) is contrary to the "interest rate clearly contemplated by the Bankruptcy Code." Appellant contends that in setting the interest at eleven percent (11%) the Bankruptcy Court failed to determine the prevailing market rate, taking into consideration the risk incident to what is equivalent

to a coerced loan from appellant to the debtor. See 5 Collier on Bankruptcy, ¶1129.03 at 1129-59 (15th ed. 1980) ("deferred payment of an obligation under a plan is a coerced loan and the rate of return with respect to such loan must correspond to the rate which would be charged or obtained by the creditor making a loan to a third party with similar terms, duration, collateral and risk"). Appellant then cites several cases that have struggled with the difficult concept of "present value" within the meaning of the Bankruptcy Code. The results in each vary; some adopt an annual percentage rate of one-half percent (1/2%) more than the current three (3) month Treasury Bill rate. In re Willis, Jr. , [1980] Bankr. L. Rep. (CCH) ¶67,640 (Bankr. Ct. N.D. Ill. Oct. 9, 1980), others have adopted the Internal Revenue Code rate since it fluctuates periodically based on market rates. In re Busman, 6 Bankr. Ct. Dec.

(CCR) 683 (Bankr. Ct. E. D. N.Y. July 25, 1980); In re Ziegler, 6 Bankr. Ct. Dec. (CCR) 194 (Bankr. Ct. S.D. Ohio April 16, 1980). Based upon these cases appellant contends that the proper interest rate in this proceeding should have been set at a rate in excess of the current Treasury Bill rate. At a minimum, appellant argues, the proper rate should be the twelve percent (12%) rate in effect under the Internal Revenue Code at the time of confirmation.

The Bankruptcy Court heard the evidence presented on this issue during the April 14, 1981 hearing. In addition to the evidence presented by the parties on the "prevailing market rate," the Court noted at that time its obligation to take into consideration the feasibility of the Plan. On this point the Court stated:

> ". . . we've taken testimony on confirmation, and I don't know that there is very much further that we need to be talking about. I'm willing to confirm this plan if the Debtor is going to be able to pay this 11%. One of the things I have to take into consideration is the question of feasibility. . ."

Satisfied that the debtor could in fact meet his obligations under the Plan and pay the eleven percent (11%) interest rate, the Bankruptcy Court then entered its order of confirmation.

This Court has reviewed the entire record, including the cases cited by both parties to the appeal, and finds that the interest rate set by the Bankruptcy Court does not constitute reversible error. The eleven percent (11%) rate was determined to be appropriate following consideration of the evidence presented by the witnesses called to testify at the April 14, 1981 hearing, with special consideration given to the debtor's ability to pay.

The final ruling of the Bankruptcy Court is adequately supported by the record, and therefore, will not be disturbed. [1/]

DATED this ___ day of _____, 1982.

SENIOR UNITED STATES DISTRICT JUDGE

1/ The affirmance of the 11% ruling by the Bankruptcy Judge in this case is limited to the facts of this case and does not constitute an affirmance or ruling one way or the other on the gratuitous comments of the Bankruptcy Judge that henceforth he will in Chapter XI cases set interest at 1% off the rate then currently set by the Internal Revenue Service for interest owed the Service (which as of the date of this order would be 19% - 1% less than the 20% set by IRS).

Copies to:

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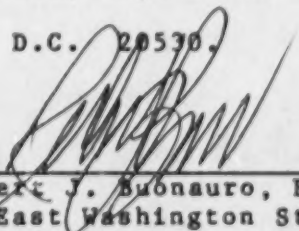
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing document have been furnished by U.S. Mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to Glenn L. Archer, Jr., Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C. 20530.



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(305) 841-1940

In The Matter of: Southern States Motor Inns, Inc., Debtor.

Southern States Motor Inns, Inc., Petitioner,

vs.

United States of America, Respondent.

_____/

AFFIDAVIT

STATE OF FLORIDA)
) SS
COUNTY OF ORANGE)

BEFORE ME, the undersigned authority, personally appeared ROBERT J. BUONAURO, who after being first duly sworn deposes and says:

1. That he is the attorney of record in the above-referenced action.

2. That he is a member of the Bar of this Court.

3. That he deposited the Petition for Writ of Certiorari, in the requisite

number of copies, in the United States Post Office located on Magnolia Street in Orlando, Orange County, Florida, first class, postage prepaid, certified with return receipt requested, properly addressed to the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, on Friday, October 7, 1983, within the time permitted for filing this Petition.

Robert J. Buchanan, Esquire
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Sworn to and Subscribed
before me this 7th day
of October, 1983.

NOTARY PUBLIC
My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires Feb. 10, 1984
Bonded Thru Troy Fain Insurance Inc.

No. 83-790

In the Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN STATES MOTOR INNS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-790

SOUTHERN STATES MOTOR INNS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the court of appeals' holding as to the proper method of computing the interest rate to be charged on deferred payments of federal tax claims in bankruptcy. The decision below is correct. Petitioner does not allege (nor is there) a conflict among the circuits on the question presented. There is no basis for review by this Court.

1. Petitioner in October 1979 filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code (11 U.S.C. 1101 *et seq.*). The United States filed a proof of claim, in the amount of $412,145, for unpaid social security and withholding taxes. In its initial plan of reorganization, petitioner proposed to pay these taxes on a deferred basis, in five equal installments, but without any interest (Pet. App. 26). After the government objected to the plan

because it made no provision for payment of interest, petitioner amended it to provide for interest at the rate of 6% (*ibid.*). The government maintained its objection on the ground that a 6% interest rate was inadequate, and the bankruptcy court held a hearing on the matter (*id.* at 26-27). The government presented evidence that the minimum interest rate then payable on safe investments (such as Treasury obligations) was 14% (Pet. App. 27). But it expressed willingness to accept on petitioner's deferred tax payments an interest rate of 12%, the rate then payable under Section 6621 of the Internal Revenue Code of 1954 (26 U.S.C. (Supp. V)) on delinquent federal tax liabilities generally. The bankruptcy court held that the Section 6621 rate was the correct starting point as a matter of law, but determined that it should be reduced by 1% to take into account "the rehabilitation aspects" of the bankruptcy plan (Pet. App. 50-51). The bankruptcy court thus found 11% to be the proper figure, and the district court affirmed this finding as not clearly erroneous (Pet. App. 60).

The court of appeals reversed, holding that the method the bankruptcy court adopted to determine the appropriate interest rate was "inadequate" (Pet. App. 35). The court of appeals noted (*id.* at 31-32) that the interest rate used in a reorganization plan must result in the creditor's receiving, in deferred payments, an amount equal to the full present value of his claim. 11 U.S.C. 1129(a)(9)(C). The Section 6621 rate, while relevant in making this determination, was not in the court of appeals' view the only factor to be considered (Pet. App. 39). Rather, it was necessary to consider the " 'prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default' " (Pet. App. 36, quoting 5 *Colliers on Bankruptcy* para. 1129.03, at 1129-65 (15th ed. 1982)). And once this "prevailing market rate" was determined, the court of appeals held, there was

no justification for reducing it on account of the plan's "rehabilitation aspects" (Pet. App. 41). While noting that the record could support a rate as high as 14%, the court concluded that the record in no event would "permit a finding that the appropriate interest rate was less than the 12% rate which [was] acceptable to [the government]" (Pet. App. 41-42). The Eleventh Circuit accordingly remanded the case with instructions that the district court apply a 12% rate, rather than an 11% rate, to petitioner's deferred payments of the government's tax claims (Pet. App. 42).

2. The court of appeals' decision is correct. Under Section 1129(a)(9)(C) of the Bankruptcy Code, a debtor that defers payment of a priority tax claim must provide in its reorganization plan for cash payments having "a value, as of the effective date of the plan, equal to the allowed amount of such claim." The legislative history reveals Congress's intent that "equal value" is to be achieved by applying an interest rate to the deferred payments that will "recogniz[e] the time-value of money." See, *e.g.*, H.R. Rep. 95-595, 95th Cong., 1st Sess. 408, 412, 413-414 (1977); 124 Cong. Rec. 32406 (1978) (remarks of Rep. Edwards); 124 Cong. Rec. 34006 (1978) (remarks of Sen. DeConcini). See also *In re Burgess Wholesale Mfg. Opticians, Inc.*, No. 82-2258 (7th Cir. Nov. 30, 1983), slip. op. 2-3. Accordingly, to determine the present value of a claim, reference must be made to market rates of interest on extensions of credit of a similar type, duration and risk. Cf. *Memphis Bank & Trust Co.* v. *Whitman*, 692 F.2d 427, 431 (6th Cir. 1982) (holding that a creditor who extended purchase money credit secured by an automobile was entitled under 11 U.S.C. 1325(a)(5)(B) to interest at the "current market rate * * * used for similar loans in the region"). See generally 5 *Collier*

on Bankruptcy para. 1129.03[1] (15th ed. 1983).[1] In the case of a federal tax claim, the rate established by Section 6621 of the Internal Revenue Code—the rate payable by taxpayers on delinquent tax liabilities generally—is surely a reasonable guidepost as to the "prevailing market rate." Although (as the court of appeals noted) other guideposts may also be relevant, and may in certain circumstances dictate a higher rate, the government was willing to accept the Section 6621 rate here, and there was thus no reason for the court of appeals to explore such other options.

Petitioner contends (Pet. 14-15) that the court of appeals, having set forth the governing legal standard, should have remanded to the district court for determination of the proper interest rate on the facts of this case. As this Court has recognized, however, where a trial court's findings are infirm because it applied an erroneous legal standard, those findings may be set aside by the appellate court, and a remand for further factfinding is not necessary if the record permits only one resolution of the issue. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982). Here, the court of appeals correctly determined (Pet. App. 39-41) that the bankruptcy court had erred as a matter of law in reducing the "prevailing market rate" by 1% on account of the plan's "rehabilitation aspects."[2] The court of appeals

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[1]The cases petitioner cites (Pet. 11-14) to show disagreement among the bankruptcy courts about the proper method of computing the rate of interest on deferred tax payments were decided before the court below and the Sixth Ciricuit in *Memphis Bank* issued their opinions.

[2]The bankruptcy court (Pet. App. 27-28) cited no authority for this arbitrary mark-down. While it is of course true that the bankruptcy law has "rehabilitation aspects," neither the language nor the legislative history of 11 U.S.C. 1129(a)(9)(C) suggests that these objectives are to be realized by applying an artificially low interest rate to priority tax claims (or by discounting the priority claims themselves). Rather, Congress expressed its intention that a creditor receive in deferred payments an amount equal to the full present value of the claim allowed.

likewise concluded (*id.* at 42) that the record would not permit a finding that the "prevailing market rate" was less than 12%. Those determinations having been made, there was nothing left for the district court to do on the issue, and the case was properly remanded with instructions that it apply the 12% rate sought by the government.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984

DOJ-1984-01